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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1959

No. 222.

HELEN COVINGTON, ET AL., *Petitioners*,

v.

J. S. EDWARDS, Superintendent of Schools of Montgomery County, North Carolina, et al., *Respondents*.

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GARLAND S. GARRISS
Troy, North Carolina

THOMAS F. ELLIS
J. C. B. EHRINGHAUS, JR.
204 Superior Building
Raleigh, North Carolina

*Counsel for Respondents*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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### STATEMENT OF THE CASE

No further statement of the proceedings in the lower courts seems necessary in view of the full and complete recitations contained in their respective Opinions. However, Respondents respectfully set forth below some general comment concerning the "Statement" in Petitioners' brief (Pet. pp. 3-6).

Petitioners emphasize in their "Statement" that there exists in Montgomery County "board imposed

segregation" and "a system of planned segregation". The District Court considered Petitioners' argument based on the proposition that the length of time elapsing since *Brown* v. *Board of Education*, 347 U.S. 483; 74 S.Ct. 686, 98 L.ed. 873 (1954), without Respondent acting to desegregate its schools, stated a cause of action for which an injunction should be granted. (Pet. Appdx., p. 27). The Circuit Court said it was advertent to Petitioners' contention that no steps had been taken to put an end to planned segregation but that enrollment and assignment of pupils for the current year should be similar to those of past years. (Pet. Appdx., p. 33). It seems clear to Respondents that the lower Courts did not find that there was a "system of planned segregation" or "board imposed segregation". The lower Courts presumed that the Respondents would follow the laws of North Carolina which abolished segregation by law, the decisions of the Supreme Court of North Carolina invalidating the State Constitutional provision establishing segregated schools (*Constantine* v. *Anson County*, 234 N.C. 221, 93 S.E. 2d 163), and the various decisions in the Fourth Circuit concerning State statutes bearing on this subject. (See *Carson* v. *Board of Education of McDowell County*, 227 F.2d 789; *Carson* v. *Warlick*, 238 F.2d 724, Cert. den. 353 U.S. 910, 1 L.ed. 2d 664; *Briggs* v. *Elliott*, 132 F.Supp. 776; *Hood* v. *Board of Trustees*, 232 F.2d 626, Cert. Den. 352 U.S. 870.) Thus, Petitioners "Statement of the Case" is not only misleading in this regard, but they "bottom" their case on a proposition which has been clearly negatived not only by the lower Courts in the instant action but by the many Circuit Court decisions arising in this Circuit since *Brown* v. *The Board*, *supra*.

## ARGUMENT

**The Court of Appeals Below Did Not Err in Affirming the Judgment of the District Court Dismissing Petitioners' Complaint for Failure to State a Claim Against the Respondents for Which Relief Could be Granted.**

The District Court said in its Opinion (Pet. App., pp. 26-27):

> "In regard to the first issue, it should be stated at the outset that the plaintiffs have not alleged in their original complaint, or in their proposed amended and supplemental complaint, that there has been any exhaustion of their administrative remedy as provided for in Section 115-176 through 115-178, General Statutes of North Carolina, known as the Enrollment and Assignment of Pupils Act. Indeed, in their brief, plaintiffs admit that they did not proceed under this act, and contend that exhaustion of administrative remedies provided for by the Act are unnecessary."

Petitioners argue at page 9 and page 12 of their Brief that the Pupil Assignment Act is irrelevant to the present issue and that the doctrine of the exhaustion of administrative remedies has no application in this case. That the Fourth Circuit has erroneously upheld the doctrine of exhaustion of administrative remedies under the North Carolina Pupil Assignment Act. The District Court succinctly states Respondents' contention as to Petitioners' attempt to circumvent the plain requirements for exhausting their administrative remedies in its Opinion (Pet. Appdx., p. 27):

> "Counsel for the plaintiffs make this contention in face of the decisions rendered by the Court of appeals for this circuit in *Carson* v. *Board of Education of McDowell County*, Cir. 4, 227 F.2d 789 (1955), and *Carson* v. *Warlick*, Cir. 4, 238 F.2d

724, certiorari denied 353 U.S. 910, 77 S.Ct. 665, 1 L.Ed. 2d 664.

"They advance the argument that the presumption relied on in *Carson* v. *Warlick*, Supra, that school officials 'will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids' is not valid because of the length of time that has passed since the decision of the supreme Court of the United States in *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), without the defendant's acting to desegregate the public schools of Montgomery County. The fallacy of this argument is readily seen when one reflects on what the Supreme Court actually held in the Brown case. As has been repeatedly stated, the Brown case does not require integration, but only holds that states can no longer deny to anyone the right to attend a school of their choice on account of race or color. *Briggs* v. *Elliott*, 132 F.Supp. 776 (E.D.S.C., 1955); *Thompson* v. *County School Board of Arlington County*, 144 F.Supp. 239 (E.D. Va., 1956); *School Board of City of Newport News, Va.* v. *Atkins*, 246 F.2d 325 (1957)."

The Court of Appeals for the Fourth Circuit in its Opinion clearly sets forth Petitioners' remedy under the North Carolina Pupil Assignment Act (Pet. Appdx., p. 33):

"... If there were no remedy for such inaction, the federal court might well make use of its injunctive power to enjoin the violation of the constitutional rights of the plaintiffs but, as we have seen, the State statutes give to the parents of any child dissatisfied with the school to which he is assigned the right to be heard on the question by the Board. If after the hearing and final decision he is not

> satisfied, and can show that he has been discriminated against because of his race, he may then apply to the federal court for relief. In the pending case, however, that course was not taken, although it was clearly outlined in our two prior decisions, and the decision of the District Court in dismissing the case was therefore correct. This conclusion does not mean that there must be a separate suit for each child on whose behalf it is claimed that an application for reassignment has been improperly denied. There can be no objection to the joining of a number of applicants in the same suit as has been done in other cases. The County Board of Education, however, is entitled under the North Carolina statute to consider each application on its individual merits and if this is done without unnecessary delay and with scrupulous observance of individual constitutional rights, there will be no just cause for complaint."

Its seems more than clear that the Petitioners are not interested in obtaining a change of assignment from the schools in which they are presently enrolled, but seek to circumvent and vitiate the North Carolina Pupil Assignment Act. More than three years ago, on April 7, 1956, in the instant action, the District Court made it clear that the Board could not compel segregation in the public schools (*Covington* v. *Montgomery County School Board*, 139 F.Supp. 163):

> "The validity of that part of the North Carolina Constitution requiring separate schools for the two races is no longer the subject for legal controversy. Nor is any statute—State or local—or order of a board compelling segregation in the public schools, a legal controversy now."

Petitioners' case, simply stated, is that strict compliance with *Brown* v. *The Board*, *supra*, would require

the District Courts in North Carolina to enjoin the 174 boards of education to ignore the North Carolina Pupil Assignment Law and present plans of desegregation or general reshuffling of pupils within their units. The late Judge Parker of the Court of Appeals for the Fourth Circuit nullified this theory in *Briggs* v. *Elliott*, 132 F.Supp. 776 which has been quoted with approval many times by the federal judiciary in this country. His opinion read in part as follows:

> "Having said this, it is important that we point out exactly what the Supreme Court has decided and what it has not decided in this case. It has not decided that the federal courts are to take over or regulate the public schools of the states. It has not decided that the states must mix persons of different races in the schools or must require them to attend schools or must deprive them of the right of choosing the schools they attend. What it has decided, and all that it has decided, is that a state may not deny to any person on account of race the right to attend any school that it maintains. This, under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races voluntarily attend different schools, as they attend different churches. Nothing in the Constitution or in the decision of the Supreme Court takes away from the people freedom to choose the schools they attend. The Constitution, in other words, does not require integration. It merely forbids discrimination. It does not forbid such segregation as occurs as the result of voluntary action. It merely forbids the use of governmental power to enforce segregation. The Fourteenth Amendment is a limitation upon the exercise of power by the state or state agencies, not a limitation upon the freedom of the individuals.

> "The Supreme Court has pointed out that the solution to the problem in accord with its decisions is the primary responsibility of school authorities and that the function of the courts is to determine whether action of the school authorities constitutes 'good faith implementation of the governing constitutional principles'. . ."

In *Hood* v. *Board of Trustees of Sumpter County School District*, 232 F.2d 627, cert. den., 352 U.S. 870, 1 L.Ed. 2d 76, the Circuit Court affirmed the District Court denial of plaintiff's request for injunction against alleged denial of admission to public schools solely on the basis of race or color on the ground that plaintiffs had not exhausted administrative remedies provided by the South Carolina statute. The Court cited *Carson* v. *Board of Education of McDowell County*, 227 F.2d 789, as authority for the per curiam decision. Thus, as early as October 15, 1956, the Supreme Court of the United States had refused to grant certiorari when a federal court, prior to consideration of a request for injunction of a school board to desegregate the schools, had required the moving parties to exhaust state administrative remedies.

While Respondents are cognizant of the fact that this Court is thoroughly familiar with the Carson cases arising in this jurisdiction, they feel that the compelling language and force contained within the decisions should be set forth in this brief. Respondents therefore call the Court's attention to the Carson cases as follows:

*Carson* v. *McDowell County Board of Education*, 227 F.2d 789:

> "In further consideration of the case, however, the District Judge should give consideration not

merely to the decision of the Supreme Court but also to subsequent legislation of the State of North Carolina providing an administrative remedy for persons who feel aggrieved with respect to their enrollment in the public schools of the State. The Act of March 30, 1955, entitled 'An Act to Provide for the Enrollment of Pupils in Public Schools', being chapter 366 of the Public Laws of North Carolina of the Session of 1955, provides for enrollment by the county and city boards of education of school children applying for admission to schools, and authorizes the boards to adopt rules and regulations with regard thereto. It further provides for application to and prompt hearing by the board in any case of any child whose admission to any public school within the county or city administrative unit has been denied, with right of appeal therefrom to the Superior Court of the county and thence to the Supreme Court of the State. An administrative remedy is thus provided by state law for persons who feel that they have not been assigned to the schools that they are entitled to attend; and it is well settled that the courts of the United States will not grant injunctive relief until administrative remedies have been exhausted. *Myers* v. *Bethlehem Corp.*, 303 U.S. 41, 51; *Natural Gas* v. *Slattery*, 302 U.S. 300, 310-311; *Hegeman Farms Corp.* v. *Baldwin*, 293 U.S. 163, 172; *United States* v. *Illinois Central R. Co.*, 291 U.S. 457, 463; *Peterson* v. *Bryan*, 290 U.S. 570, 575; *Porter* v. *Investor's Syndicate*, 286 U.S. 461; *Matthews* v. *Rogers*, 284 U.S. 521, 535-526; *Prentis* v. *A. C. L. R. Co.*, 211 U.S. 210.

"This rule is especially applicable to a case such as this, where injunction is asked against state or county officers with respect to the control of schools maintained and supported by the state. The federal courts manifestly cannot operate the schools. All that they have power to do in the premises is to enjoin violation of constitutional

rights in the operation of schools by state authorities. Where the state law provides adequate administrative procedure for the protection of such rights, the federal courts manifestly should not interfere with the operation of the schools until such administrative procedure has been exhausted and the intervention of the federal courts is shown to be necessary. As said by Mr. Justice Stone in *Matthews* v. *Rodgers, supra* (284 U.S. 525): 'The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal court, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be presrved without it.' Interference by injunction with the schools of a state is as grave a matter as interfering with its fiscal operations and should not be resorted to 'where the asserted federal right may be preserved without it.'"

*Carson* v. *Warlick*, 238 F.2d 724, cert. den. 353 U.S. 919:

"While the presentation of the children at the Old Fort School appears to have been sufficient as the first step in the administrative procedure provided by statute the prosecution of a joint or class proceeding before the school board was not sufficient under the North Carolina statute as the Supreme Court of North Carolina pointed out in its opinion; and not until the administrative procedure before the board had been followed in accordance with the interpretation placed upon the statute by that court would applicants be in position to say that administrative remedies had been exhausted.

"It is argued that the Pupil Enrollment Act is unconstitutional; but we cannot hold that that statute is unconstitutional upon its face and the question as to whether it has been unconstitution-

ally applied is not before us, as the administrative remedy which it provided has not been invoked. It is argued that it is unconstitutional on its face in that it vests discretion in an administrative body without prescribing adequate standards for the exercise of the discretion. The standards are set forth in the second section of that act, G. S. 115-177, and require the enrollment to be made 'So as to provide for the orderly and efficient administration of such public schools, the effective instruction of the pupils enrolled, and the health, safety and general welfare of such pupils'. Surely the standards thus prescribed are not on their face insufficient to sustain the exercise of the administrative power conferred. As said in *Opp Cotton Mills* v. *Administrator of the Wage and Hour Division of the Department of Labor*, 312 U.S. 126, 145; 'The essentials of the legislative function are the determination of the legislative policy and its formulation as a rule of conduct. Those essentials are preserved when Congress specifies the basic conclusions of fact upon ascertainment of which, from relevent data by a designated administrative agency, it ordains that its statutory command is to be effective.' The authority given the boards is 'of a fact-finding and administrative nature, and hence is lawfully conferred'. *Sproles* v. *Binford*, 286 U.S. 374. See also *Douglas* v. *Noble*, 261 U.S. 165, 169-170; *Holt* v. *Geiger Jones Co.*, 242 U.S. 539, 553-554; *Mutual Film Corp.* v. *Hodges*, 236 U.S. 230, 245-246; *Red "C" Oil Mfg. Co.* v. *North Carolina*, 222 U.S. 380, 394.

"Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the

> Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown, et al.* v. *Board of Education, et al.* 349 U.S. 294, 299: 'School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles'."

The rule that requires Petitioners to exhaust their administrative remedies does not except cases where parties applying for relief allege the violation of rights secured by the Constitution. This Court said in *Vandalia R. Co.* v. *Public Service Co.*, 242 U.S. 255, 261, 61 L.Ed. 276, 286:

> "The general rule is that one aggrieved by the rulings of such an administrative tribunal may not complain that the Constitution of the United States has been violated if he has not availed himself of the remedies prescribed by the state law for a rectification of such rulings. *Bradley* v. *Richmond*, 227 U.S. 477, 485, 57 L.Ed. 603, 606'."

The petitioners contend that: ". . . The statute does not afford the administrative means capable of furnishing the relief to which the Petitioners are entitled; it neither requires segregation nor affords a means of eliminating segregation." (Pet., p. 9) Respondents contend that the administrative means capable of furnishing relief to Petitioners is embodied in the Pupil Assignment Act. As the District Court said ". . . The presumption relied on in *Carson* v. *Warlick*, *supra*, that school officials obey the law, observed the stand-

ards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids'" is a proper one and the attack made on this presumption is a fallacious argument when one reflects on what the Supreme Court held in the *Brown* case. A decision contrary to that of the District and Circuit Courts would in effect go far towards nullifying the very principle of the administrative remedies.

Petitioners in their brief argue that they pursued their administrative remedies by a petition asking the Board to prepare and pursue a plan of general desegregation (Pet., p. 10). Thus, the Petitioners at one and the same time urge on this Court that they may ignore the Pupil Assignment Act and then urge upon the Court that they have pursued their remedies under the Act. Yet, it is clear from the pleadings that the plaintiffs did not allege in either their original complaint or in their proposed amended and supplemental complaint that they had exhausted their administrative remedies. (Pet. Appdx., p. 26) Even if Respondents are not following the mandate of *Brown* v. *The Board, supra*, which is denied, the procedure for bringing this to the Federal judiciary's attention has not been invoked. If one were to petition a District Court for benefits under the Social Security Act and allege entitlement to same, the District Court would hardly have jurisdiction nor would a cause of action be stated unless full compliance with the administrative procedures as set out in an act of Congress were fully and properly exhausted. This is a fundamental principle of administrative law which the Petitioners seek to circumvent in the instant action despite the clear procedures outlined in the North Carolina Pupil Assignment Act. Any opinion holding to the contrary would

vitiate the great body of administrative law that is responsible for carrying out the multifarious duties imposed by federal, state and local statutes.

Now, turning briefly to Petitioners' reasons for granting certiorari based on a conflict of decisions with other Circuit Courts, Respondents urge that there are in fact no conflicts existing and, even if given such an interpretation, they are clearly distinguishable upon the facts in each case.

Attention of the Court is directed by the Petitioners to decisions rendered by the Court of Appeals for the Fifth Circuit. The most exhaustive decision in that Circuit was rendered in *Shuttlesworth* v. *Birmingham Board of Education*, 162 F. Supp. 372, Aff'd. 3 L.Ed.2d 145 (1958), in a decision handed down by Judge Rives for the three judge District Court. Judge Rives noted the difference in the Louisiana and Virginia situations wherein state law either required segregated schools or withdrawal of funds for them to operate which were coupled with an assignment act. Judge Rives states that the North Carolina Pupil Enrollment Act contained adequate standards and cited *Carson* v. *Warlick*, *supra*, as authority for same. In the body of the decision the Court quotes from earlier decisions as follows:

> "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of the race or color of children in the public schools. *Avery* v. *Wichita Falls Independent School District*, 5 Cir., 1957, 241 F.2d, 230, 233. Pupils may, of course, be separated according to their degree of advancement or retardation, their ability to learn, on account of their health, or for any other legitimate reason,

but each child is entitled to be treated as an individual without regard to his race or color. *Borders v. Rippey*, 5 Cir., 1957, 247 F.2d 268, 271."

Although Petitioners rely on a conflict between the Fourth and Fifth Circuits, the concluding language of Judge Rives in the Shuttlesworth case seem clearly to nullify this proposition. Judge Rives' conclusion is as follows:

"The grounds upon which the Louisiana and Virginia Acts were declared unconstitutional on their face have been heretofore stated at some length. See ante pages 6, 7, and 8. Enough has also been said to show that none of those grounds are applicable to the Alabama Act. The legal situation in Alabama is more analogous to that in North Carolina, where the Pupil Enrollment Act was ruled to be not unconstitutional on its face, in an opinion by the late great Chief Judge Parker, from which we quote:

'Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law, observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief should the courts be asked to interfere in school administration. As said by the Supreme Court in *Brown v. Board of Education*, 349 U.S. 294, 299, 75 S.Ct. 753, 756, 99 L.Ed. 1083:

'School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to

consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.'"

*Carson* v. *Warlick*, 4th Cir. 1956, 238 F.2d 724, 728.

"'All that has been said in this present opinion must be limited to the constitutionality of the law upon its face. The School Placement Law furnished the legal machinery for an orderly administration of the public schools in a constitutional manner by the admission of qualified pupils upon a basis of individual merit without regard to their race or color. We must presume that it will be so administered. If not, in some future proceeding it is possible that it may be declared unconstitutional in its application. The responsibility rests primarily upon the local school boards, but ultimately upon all of the people of the State.'"

The Petitioners urge upon this Court the decision in *Gibson* v. *The Board of Public Instruction of Dade County*, 246 F.2d 913, from the Fifth Circuit, as an essentially identical legal situation and that it is in conflict with the decisions of the Fourth Circuit. Respondents call to the Court's attention that the *Shuttlesworth* case in the Fifth Circuit and written by the same Chief Judge, was rendered on May 9, 1958 whereas the *Gibson* decision was rendered July 23, 1957. Hence, from the language employed in the *Shuttlesworth* case by Judge Rives it is clear that there is no conflict between the Fifth Circuit and the Fourth Circuit. A cursory examination of the Gibson case indicates that the Board had taken the position of continuing to operate, maintain and conduct the schools on a non-integrated basis. The Court quotes the decision of the Fourth Circuit in *School Board of Char-*

*lottesville, Va.* v. *Allen*, 240 F.2d 59, 63, 64 (4th Cir. 1956) to the effect that the admission statute is a nullity as under the "announced policy of the respective school boards any such application to a school other than a segregated school maintained for colored people would have been futile; and equity does not require the doing of a vain thing as a condition of relief". This is far from the factual and legal status of the instant action. Respondents also call the Court's attention to the District Court's decision which we presume was rendered in conformity with the District Judge's understanding of the Circuit Court decision in *Gibson v. Board of Public Instruction of Dade County* on remand of that case to the District Court, 170 F.Supp. 454. Judge Lieb's understanding of the Fifth Circuit's opinion and of the *Shuttlesworth* case are contained in the following quotations:

> "As to the prayer of the Complaint that the Court order the Defendants to promptly present a plan of desegregation of the schools, the Court finds that the Florida Pupil Assignment Law enacted by the Legislature of Florida since the filing of this suit meets the requirements of such a plan and the demands of the Plaintiffs. That Act provides a comprehensive plan and directive for the enrollment and assignment of all pupils in the public schools by the Boards of Public Instruction of the several counties and for appeals from such decisions made by the Boards, all on an individual basis. No reference whatever is made in the Act to consideration of race or color of the pupils.
>
> "Plaintiffs made no challenge to the validity of the Pupil Assignment Law. It, therefore, enjoys a presumption of validity as a State Statute. Defendants as state officials are required to follow

the provisions of the State laws until they are repealed; superseded or held invalid by the Courts."

* * *

"It is noted that the provisions of the Alabama School Placement Law are similar in all material respects to those of the Florida Pupil Assignment Law, both of which were modeled after the North Carolina Pupil Placement Act.

"The three-judge court in the Birmingham case also denied all injunctive relief to the Plaintiffs and left them to the fair operation of the School Placement Law and the remedies therein provided. The Court in that case was likewise considering the issue raised by the Complaint as a basis for the application for an injunction that despite the passage of the Pupil Placement Act, Negro students were still being assigned to the same schools on a basis of segregation of the races irrespective of the nearness of other public schools to the homes of the plaintiffs.

"In that case also, the opinion shows that the School Board had refused to render any opinion or take any action upon tests given by the Board to Plaintiffs as a basis of assignment under the Act. It has already been noted that in the present case, the Plaintiffs themselves refused to proceed with clearly available procedure offered under the Florida law for relief from adverse decisions of the school authorities.

"In denying the injunction in the Birmingham case the three-judge court pointed out that any complaints of improper administration of the School Placement Law should be tested by the Courts only after exhaustion by the pupil or parent of the administrative remedies provided by the State law, and quoted from an opinion of the late great Chief Judge Parker, of the Fourth Circuit

Court of Appeals, in a similar case, *Carson* v. *Warlick*:

> "Somebody must enroll the pupils in the schools. They cannot enroll themselves; and we can think of no one better qualified to undertake the task than the officials of the schools and the school boards having the schools in charge. It is to be presumed that these will obey the law; observe the standards prescribed by the legislature, and avoid the discrimination on account of race which the Constitution forbids. Not until they have been applied to and have failed to give relief, should the Court be asked to interfere in school administration."

> "The plaintiffs now have available to them adequate remedies under the Pupil Assignment Law for any of their grievances pleaded in the Complaint. The record shows that they have not pursued them and until they do so and have been denied their rights they are not entitled to injunctive relief."

Petitioners then call the Court's attention to *Holland* v. *The Board of Public Instruction*, 258 F.2d 730, and the Circuit Court decision rendered by Judge Rives. There were two very important distinctions between this case and the instant action pending before this Court. In the *Holland* case there was an application by an individual plaintiff for admission to a particular school as well as a City Ordinance requiring compulsory residential segregation. The Court said: "In the light of compulsory residential segregation of the races by City Ordinance, it is wholly unrealistic to assume the complete segregation existing in public schools is either voluntary or the incidental result of valid rules not based on race."

Thus, the *Holland* case is brought clearly within the Virginia and Louisiana decisions of the Fourth and

Fifth Circuits respectively where despite an assignment statute, if there existed statutes which nullified the effectiveness of them, then quite clearly they need not be complied with. Again, this is not the situation in the instant case. The instant case falls clearly within the doctrine of *Carson* v. *Warlick*, *supra*, which has been quoted favorably in both the Fourth and Fifth Circuits in both the Virginia and Louisiana actions. *Orleans Parish School* v. *Bush*, 242 F.2d 156, 164; *School Board City of Charlottesville, Va.* v. *Allen*, 240 F.2d 59, 64; *Adkins* v. *School Board of Newport News*, 246 F.2d 325, affirming 148 F.Supp. 430. The Petitioners then turned from the Fourth and Fifth Circuits for a possible conflict to the District Court for the Middle District of Tennessee in *Kelly* v. *Board of Education City of Nashville*, 159 F.Supp 272. It is clear from the language by Petitioners on page 15 of their brief that the District Judge although recognizing the apparent scope of the Fourth Circuit decisions could not reach the same conclusions "on the facts of the instant case". The Court then said: "This is true because the Court is of the opinion that the administrative remedy under the Act in question would not be an adequate remedy". Thus, the District Judge in the *Kelly* case concluded that the facts were distinguishable from those contained in the Fourth Circuit cases and further concluded that the administrative remedy in Tennessee would "not be an adequate remedy". The Pupil Assignment Acts have not only been held by the various Circuit courts to be adequate administrative remedies but this Court has affirmed the Shuttlesworth case from the Fifth Circuit, *supra*, and denied certiorari in *Carson* v. *Warlick*, *supra*.

In conclusion, Respondents feel that some comment should be made on the third reason advanced by Petitioners for granting certiorari. Whereas the reason

set forth in the caption is that the decision below presents important questions of federal jurisdiction practice and procedure which should be resolved by this Court, the text which follows, for the most part, deals with matters foreign to the instant action and contentions raised for the first time in this Court—matters which were not raised by the complaint, nor urged upon the District and Circuit Courts. However, Respondent feels that it must make a few general remarks to the Petitioners' "broadside."

Petitioners hark back generally to the same argument that "race must be eliminated in consideration of assignment of children to the public schools". This has been admitted by the respondents in their answer to the pleadings, it was stated by Judge Hayes in his Opinion in the instant action on April 7, 1956, 139 F.Supp. 161 when he stated: "The validity of that part of the North Carolina Constitution requiring separate schools for the two races is no longer the subject for legal controversy. Nor is any statute—state or local—or order of the board compelling segregation of the public schools, a legal controversy now". Petitioners' argument in this section of the brief would lead this Court to believe that the North Carolina Assignment Act and its administration by the local boards is a planned method to continue segregation. They fail to take note of the instances of admission of Negro students to what were formerly "all white schools" in this State. Of course, Respondents contend that this sort of argument has no place in this action as Petitioners must clearly invoke their administrative remedy before the Court has any predicate upon which to act.

On page 19 of the brief is found the following: "Petitioners, however, view the federal judiciary's role

as being solely to eliminate the use of racial standards in the system and not to become involved in multitudinous individual assignments." Again, Respondents have clearly recognized the mandate of *Brown* v. *The Board, supra*, which requires them to eliminate the use of racial standards in the assignment of pupils. Of course, Respondents recognize the innuendo in this section of Petitioners' brief that there exists some "subterfuge" to maintain segregation in the schools. This, the Respondent denies, but even if it were so, the petitioners must place their action before the federal judiciary in a manner on which the Court may act. There are no facts concerning a "subterfuge". The Petitioners have had since 1955 to present to the federal judiciary evidence of "a subterfuge".

## CONCLUSION

Petitioners have not made a case which would warrant this Court in granting Petition for Writ of Certiorari in accordance with Rule 19 of the Revised Rules of the Supreme Court of the United States. The Respondent prays that the Court refuse to issue Writ of Certiorari to review the Judgment and decision of the United States Court of Appeals for the Fourth Circuit entered in this cause on March 19, 1959, and that the Petition heretofore filed therefore be denied.

Respectfully submitted,

GARLAND S. GARRISS
Troy, North Carolina

THOMAS F. ELLIS
J. C. B. EHRINGHAUS, JR.
204 Superior Building
Raleigh, North Carolina

*Counsel for Respondents*